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Supreme Court, U.S.
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No. _____

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

October Term, 1996

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JUDY ANN SHOWERS,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner was denied a fair trial by the admission of unduly remote negative character reputation evidence from witnesses whose knowledge of her reputation and traits at her former place of employment was acquired nine to fifteen years prior to trial?

2. Whether Petitioner was denied the effective assistance of counsel by the failure of her attorney to conduct any meaningful cross-examination of the Commonwealth's psychiatrist, who opined that Petitioner's husband was not a suicide risk, which testimony contradicted the defense theory that he had committed suicide and the defense forensic psychiatrist's opinion that he definitely was a high suicide risk?

## LIST OF ALL PARTIES

The parties to this petition for writ of certiorari are: Judy Ann Showers, Petitioner herein, by and through her counsel of record, William C. Costopoulos, Esquire; and the Commonwealth of Pennsylvania, the Respondent herein, by and through its counsel of record, Tony Rosini, District Attorney of Northumberland County, Sunbury, Pennsylvania.

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## REFERENCE TO OPINIONS BELOW

The opinion of the Superior Court of Pennsylvania in this case, filed on June 20, 1996, is reported at ___ Pa.Super.___, 681 A.2d 746 (1996), and is reproduced in the Appendix beginning at page A2.

The opinion of the trial court, the Honorable Barry F. Feudale, Judge of Northumberland County, Pennsylvania, dated September 12, 1995, is reproduced in the Appendix beginning at page A46.

## STATEMENT OF JURISDICTION

This petition for a writ of certiorari is from the order of the Supreme Court of Pennsylvania entered on November 27, 1996, denying the Petitioner's petition for allowance of appeal. The Superior Court of Pennsylvania, in an order entered on June 20, 1996, affirmed the judgment of sentence imposed by the trial court.

Your Honorable Court has jurisdiction of this matter pursuant to Section 1257(a) of Title 28, 28 U.S.C. § 1257(a), and Rule 10 et seq., Rules of the Supreme Court of the United States.

## CONSTITUTIONAL PROVISIONS AND STATUTES

### Sixth Amendment to the United States Constitution

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

## STATEMENT OF THE CASE

This petition for writ of certiorari to the Superior Court of Pennsylvania arises from the order affirming the Petitioner's judgment of sentence; President Judge McEwen dissented without comment.

Following a trial by jury, Petitioner was convicted of first-degree murder in the Court of Common Pleas, Northumberland County, Pennsylvania on March 23, 1994. She was sentenced to the mandatory term of life imprisonment without parole. The charge stemmed from the murder of her husband, Delbert Showers, in their rural home in Watsontown, Northumberland County.

According to the 911 emergency dispatcher, a "disjointed" Mrs. Showers telephoned around 5:30 p.m. on September 2, 1992 and reported that something was "wrong" with her husband and she wanted the Pennsylvania State Police to assist her; it was not clear what the problem was. R. 2a, 4a-6a. She was a practical nurse, age 48, attending nursing school to become a registered nurse; he was 50, retired as a federal prison guard, and a real estate investor. The police and an ambulance crew were dispatched to the scene.

Trooper McBride, who nine months later would become the affiant, arrived at the home at 6:29 p.m. The body of Mr. Showers was located in a downstairs recreation room, clad only in underwear, on a sofa. "I learned that the suicide note was on a shelf and had been discovered by Norman Showers[,]" his brother. He examined the body, secured the note and a glass next to

the sofa, and notified the coroner. R. 263a-264a.

Told it was a possible suicide, the coroner pronounced Mr. Showers dead at 7:20 p.m. R. 13a, 17a. An "orange-colored discharge" emanated from the decedent's nostrils; orange liquid and a white chalky substance were seen in the glass next to the body. R. 17a. The "suicide" note read as follows:

> Dear Judy, I'm sorry. Sorry for all the hurt I have caused you. I can't stand to lose you. My life is nothing without you. I'm sorry for hurting the girls. I was having an affair. I lied to you when I said I wasn't. You had all of it right. I'm very nervous. I went to the doctor last week to see if I had cancer. I never went back to find out. I would rather go this way than a slow and agonizing death. Please forgive me. Please don't let them do an autopsy on me. I'm going to take an overdose of Serax and morphine. Helen doesn't know I took her Roxanol. Norm will help you with the homes or sell them. I know you -- I know you were sick last night. I could hear you vomiting in the bathroom. I knew you wouldn't come downstairs. Besides you're used to me lying on the couch and watching T.V. I have to get started. By the time you find me I should be gone. I know you will let me sleep until I get up

myself. I'm sorry you will find me this way. Please bury me next to my father. Tell mom I'm sorry. I love you all. Del.

R. 19a. Toxicological tests on the blood and urine samples taken revealed the presence of Serax, an anti-anxiety, anti-depressant medication, and morphine; Roxanol is a brand of liquid morphine. R. 20a-21a, 25a, 30a-31a. The concentration of morphine in the blood was .94 milligrams, nine times the normal dosage; it was a lethal dose, according to a toxicologist. R. 33a-34a.

At the scene, Mrs. Showers told the police and coroner the same version of events she would later testify to at trial, with one notable exception. According to Petitioner, the night before between 8 and 8:30 p.m., the couple went to the Arrowhead restaurant and ate pork sandwiches. Upon their return home, they watched a movie in the downstairs "rec" room. Judy became sick and started vomiting; she retired to bed at midnight while he continued to watch television. R. 129a-130a, 26a, 200a-202a.

The next morning, Delbert's brother, Norman Showers, phoned their home about 9 a.m. and Mrs. Showers answered and said that Delbert was still sleeping. R. 45a, 130a-131a. Norm told her not to bother him and she left another note and went back to sleep. R. 203a-205a. Not until 4:30 p.m. that afternoon did Petitioner awake; she took a shower, put some clothes in the wash and went into the family room; the TV was still on. R. 206a, 26a, 132a.

On the sofa was Delbert Showers, "ice

cold" and black. Thinking he had a heart attack, she checked his pulse. "I knew he was dead." R. 207a-208a. Petitioner immediately called Norman Showers and said she needed help: "I can't get Delbert awake." He told her to call an ambulance and that he would come right over; the time was 5:30 p.m. R. 45a-46a. Mrs. Showers told the police that Norman found the suicide note when he rolled the body over and that it was in Delbert's handwriting. R. 133a, 135a. After reading it, Norman told her: "My God, Judy it says he took something." R. 259a. Mrs. Showers also testified that she found a cup filled with a bitter liquid next to him, poured it out and yelled at Delbert: "Why did you do this to me?" R. 209a-211a, 138a. She threw the one cup away. R. 211a.

The Showers' adult daughter, Susan Showers, testified that her sister, Diane Showers, called her about 5:45 p.m. and said: "Mom just called an ambulance for Dad. She can't get him awake." "Mom thinks Dad took Helen's Roxanol." R. 120a-122a. Helen was Helen Wolfe, a close friend of the Showers with cancer; she and Delbert had a nine-year affair from 1975 to 1986. R. 57a-59a.

Shortly after his brother's death, Norman Showers became skeptical whether Delbert was the real author of the "suicide" note; he told the police he was not sure it was his brother's handwriting. R. 260a-262a. A state police document examiner eventually excluded Mr. Showers as the note's author but concluded that Judy Showers "is very capable of having written the suicide note." R. 75a-77a. Because of

this mystery, and an apparent discrepancy between when Mrs. Showers said she first saw the note and when Susan Showers told the police her mother informed her that Delbert overdosed on Helen's morphine, the coroner ordered that his body be exhumed on October 30, 1992; Mrs. Showers consented. R. 27a-28a.

A forensic pathologist determined that the cause of death was an oral morphine overdose. R. 35a-40a. By February 1994, the police confronted Judy Showers with their tests on the "suicide" note. After first insisting that the handwriting was her late husband's, she admitted that she in fact was its author. "I wrote the suicide note because I was afraid of how it would look without one." R. 139a, 137a. She would elaborate on why she wrote it at trial. Mrs. Showers was arrested and charged with murdering her husband in May 1994. R. 140a.

Helen Wolfe, the Showers' best friend, was Delbert's lover for nearly nine years. She first met Judy in nursing school 16 years before her arrest: "Judy is my best friend." R. 56a. She also said that Del was her best friend. R. 60a. She adamantly denied telling the police that Judy and her husband, Fred, had an affair at the same time; Fred also denied having an affair with Judy. R. 57a-59a, 177a. The four would travel together and Delbert would come over to the Wolfe's home every day, playing cards and watching television.

After Helen was diagnosed with cancer and her husband, Fred, took sick, Delbert became her caretaker. She kept a bottle of

Roxanol, liquid morphine, in her refrigerator; Delbert would administer it to her. R. 64a. During the summer of 1992, Helen testified she suspected that Delbert was having an affair with her sister, Sylvia Knecht, who had numerous husbands and boyfriends; she confided her suspicions to Judy. R. 61a-62a. Sylvia confirmed that after her latest divorce, she had an affair with Delbert starting in July of 1992 until his death. R. 69a-72a.

Extensive evidence supporting the defense theory that Delbert Showers committed suicide was presented to the jury. It was undisputed that Mr. Showers had mental health problems, including depression and anxiety for which he was on Serax, a medication prescribed by Dr. Ina Gilmore. R. 127a-128a. In 1980, he was voluntarily committed to Williamsport Hospital after suffering an emotional breakdown; he was under FBI investigation for misappropriation of funds at the Lewisburg Federal Penitentiary. R. 43a. He was hospitalized from September 7 until October 8, 1980, shaking and crying. R. 159a. The medical charts described him as suicidal, with depression and hypertension. R. 226a-227a. In January 1987 again he had anxiety and depression. R. 230a.

Delbert Showers selectively discussed suicide with others. Helen Wolfe, his best friend who had terminal cancer, testified that "Delbert told me he was going to commit suicide." "I begged him not to." She and Delbert often discussed using Roxanol to commit suicide. R. 65a-67a.

Susan Showers, his daughter, testified

that her father often talked about taking his own life. He "would mention things like he was going to 'take the pipe.' Or else he would say, "I might as well just lay down and die." Just three days before he died, Mr. Showers hugged her with watery eyes and said: "I love you, honey. Take care of yourself." R. 161a, 166a. She also said that her father's friend called him "the medicine man" because he used so many pills and would even put Serax into his coffee. R. 167a-168a. Karen Rooker, the Wolfe's daughter, characterized her parents as best friends of the Showers, heard Del often discuss suicide and said that Helen would not be the first to go; she added that Del always had pills with him. R. 169a-171a. Judy's sister, Joyce Ravitsky, testified that she too heard him talk about killing himself: "I don't know why I'm here. I'll just go away somewhere and end it all." R. 144a-145a. Even Norman Showers, his brother and a Commonwealth witness, admitted that he heard Del say: "I could take the pipe. They wouldn't care." "The money is all they want."

Given this evidence of suicide, the defense called Harry Doyle, M.D., a board-certified forensic psychiatrist, to review the subjective evidence together with Mr. Showers' medical charts in an effort to determine whether he was a suicide risk and, if so, to what degree; Dr. Doyle specializes in compiling psychiatric profiles of decedents. R. 220a, 222a-223a. He rendered this expert opinion:

> It is my opinion, within a reasonable degree of medical certainty, that Delbert Showers

> was experiencing multiple suicide risk factors at the time of his death and, as a result, was at high risk for suicide at that time.

This forensic psychiatric conclusion was predicated on several factors. The suicide rate in the general population is 10 to 15 per 100,000; with a psychiatric diagnosis, it rises to 40 to 50 per 100,000. Mr. Showers was hospitalized for 31 days in 1980 and exhibited signs of suicide, depression and hypertension. R. 224a-230a. Again in January 1987 he suffered from depression and anxiety; he was on Serax. R. 230a.

Dr. Doyle further testified that general practitioners often overlook depression and the accompanying suicide potential. R. 272a. Mr. Showers was overweight (250 plus pounds), was concerned about an early death, and was having a secret affair, which Dr. Doyle opined a person like Delbert could not handle. He said:

> [T]his man was definitely -- would be considered at risk for a suicide. And he would need a treatment to lower those risk factors. His psychiatric illness was still there. He didn't receive proper psychiatric treatment. [He had] chronic suicidal thinking ideation.

R. 231a-232a, 234a-235a. Finally, Dr. Doyle described Delbert as suffering from "atypical depression," meaning that his degree of depression varied from day to day;

it was "not every day." R. 235a.

To counter Dr. Doyle's testimony, the Commonwealth called John Hume, M.D. on rebuttal who, unlike Dr. Doyle, is not a board-certified psychiatrist. Dr. Hume disagreed with the assessment that Mr. Showers was a suicide risk. R. 239a-240a. He stated that Mr. Showers "met only 5 of the 10 factors" for suicide. R. 241a-242a. Despite Dr. Hume's detailed testimony, defense counsel conducted brief, rudimentary cross examination, which is reproduced in its entirety below and is a question presented to this Court for review. R. 242a-244a.

Petitioner recounted how she discovered the body of her husband of 28 years and why she wrote a suicide note:

> I wrote that before I called Norman. I was so scared. I was so scared. I thought I was going to be blamed for it, which I have been blamed for it. I didn't do it. I've never hurt anybody in my whole life. . . . I did it so fast I couldn't even have told you everything that was there.

R. 270a-271a. She included the Serax and morphine in the note because she found them beside him: "The capsules were there. And when I stuck my hand in that cup and when I tasted it -- Delbert has asked me many times, "What would happen to Helen if she took an overdose of that liquid morphine?" And I told him, "She would probably just go to sleep." R. 212a. She threw the morphine away. R. 211a. Mrs. Showers put the note

under him and called Norman. R. 213a.

Mrs. Showers strongly proclaimed her innocence: "I know I didn't kill my husband." "I wouldn't kill Delbert. He was my husband. He was the other half of my life. I was married to him for 28 years." R. 215a, 217a. Several character witnesses attested to her reputation in the community for being a law-abiding citizen. Arlene Edwards, who had known her for 15 years, said she had an "excellent" reputation for law-abidingness. R. 172a-173a. A fellow nurse, Ann Trepowski, with 7 years of personal knowledge of Mrs. Showers and those in the community, described her reputation as "good." R. 218a.

The Commonwealth was allowed by the trial court to introduce several negative character witnesses, all from Petitioner's former place of work, over defense objections. Diane Campbell, who last knew Petitioner in 1985 or nine (9) years before trial as a fellow nurse, characterized her reputation for honesty as "not good." R. 245a-248a. Another nurse, Michelle Steinbacher, who also last knew Mrs. Showers nine years earlier, testified: "It -- it wasn't good. Judy wasn't trusted by my staff." R. 249a-250a. And Gloria Harbaugh, who knew her for just one year at the Williamsport Hospital (in 1989), said her reputation for honesty "was bad, not good." She also was allowed to say that she fired Petitioner from her position in the accounting department. R. 252a-254a. The question of remoteness is presented to this Court for review.

The jury deliberated and returned a

first-degree murder verdict on March 23, 1994. R. 255a-256a. Mrs. Showers was immediately sentenced to life imprisonment. Timely post-sentence motions were filed and denied by operation of law on March 23, 1995. Undersigned counsel entered his appearance and timely filed a notice of appeal with the Superior Court of Pennsylvania on April 13, 1995. The lower court filed its Rule 1925 opinion on September 12, 1995. See Appendix.

After the filing of briefs and oral argument, the Superior Court, in a 2-to-1 decision, affirmed the judgment of sentence in a published opinion filed on June 20, 1996; President Judge McEwen dissented. See Appendix. As to the remoteness of the negative character reputation evidence, after observing that it is the character at the time the defendant testifies that is relevant, the majority nevertheless held that the testimony of witnesses based on their 9 to 15-year old knowledge of the defendant's character was still admissible because there was evidence that Petitioner had a continuous reputation for dishonesty.

Petitioner timely filed a petition for allowance with the Supreme Court of Pennsylvania which was denied by order entered on November 27, 1996. See Appendix.

## REASONS FOR ALLOWANCE OF WRIT

1. Petitioner was denied a fair trial by the admission of unduly remote negative character reputation evidence from witnesses whose knowledge of her reputation and traits at her former place of employment was acquired nine to fifteen years prior to trial.

This issue affords Your Honorable Court the opportunity to address squarely the very important role of character reputation evidence in a criminal trial and, specifically, how the remoteness of negative character reputation evidence affects its admissibility and a defendant's constitutional right to a fair trial. Not since the landmark decision of Michelson v. United States, 335 U.S. 469, 93 L.Ed. 168, 69 S.Ct. 213 (1948), has the Court discussed the standards for admitting character reputation evidence at a criminal trial. Subsequently, both federal and state courts have developed a body of case law on several questions pertaining to character reputation evidence which at times conflicts with this Court's precedent in Michelson and Edgington v. United States, 164 U.S. 361, 41 L.Ed. 467, 17 S.Ct. 72 (1896). Granting certiorari would enable the Court to revisit this critical evidentiary issue, promulgate standards with regard to the remoteness of character reputation evidence (positive and negative), and resolve the conflicts which have arisen in the courts below.

In Michelson, this Court realized the decisive impact that character reputation evidence may have on a jury's verdict by observing that evidence of good character,

standing alone, may raise a reasonable doubt of a defendant's guilt:

> [A defendant] may introduce affirmative testimony that the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged. This privilege is sometimes valuable to a defendant for this Court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed.

93 L.Ed. at 174 citing Edgington. Such evidence is considered unusual because it is grounded solely on hearsay: "The witness is . . . allowed to summarize what he has heard in the community, although much of it may have been said by persons less qualified to judge than himself." Id.

The prosecution may not, on its own, introduce evidence of a defendant's poor reputation. The Michelson Court held:

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. . . . The inquiry is not rejected because character is irrelevant; on the contrary, it is said to

> weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.

93 L.Ed. at 173-174; footnote omitted. Only if the defendant elects to adduce evidence of his or her good reputation may the prosecution introduce bad reputation evidence, either through cross examination of the defense character witnesses or by presenting its own negative character reputation witnesses. 93 L.Ed. at 176-177. This negative evidence, however, carries the risk of substantial prejudice if not carefully admitted. See United States v. Monteleone, 77 F.3d 1086, 1089 (8th Cir.1996) (citing Michelson but granting a new trial because the prosecutor asked improper questions of defense character witness).

With this background, at issue here are two closely related questions on negative character reputation evidence: 1) to what time period must the knowledge of reputation relate in order to be relevant; and 2) how remote in time may the reputation knowledge be for admissibility. Some jurisdictions have ruled that reputation at the time of the offenses charged is the relevant period. Others contend that it is the reputation at the time of trial, particularly where the defendant testifies on his or her own behalf. And still others find both time periods relevant and therefore acceptable.

Not expressly stated in Michelson, but of considerable import instantly, is that

relevant period of time. Based on the excerpt of testimony cited, e.g., "And what is his reputation?," it seems that the Court found that the reputation at the time of trial was relevant. 93 L.Ed. at 172. The Fourth Circuit, citing Michelson and evidence commentators, has held: "With defendant's credibility as a witness in issue, his reputation at the time of trial was crucial and, therefore, relevant." United States v. Null, 415 F.2d 1178, 1180 (4th Cir.1969); original emphasis, citations omitted. See also: State v. Rivera, 612 P.2d 526, 531 (Hawaii 1980) (same citing Null and other authority).

The Third Circuit, however, has ruled as follows:

> it has long been settled that reputation reasonably contemporaneous with the acts charged is relevant, but that reputation after the criminal charge under consideration is not. . . . The reason for this limitation on relevancy is that the accused's reputation could well be affected by the gossip which accompanies an indictment, and thus might not be a fair reflection of his character."

United States v. Curtis, 644 F.2d. 263, 268-269 (3rd Cir.1981) (citations omitted). Some commentators are in accord. "It is character at the time of the alleged crime that bears most nearly on the inference of innocence or guilt, and the reputation evidence must be confined to reputation at that time or a reasonable time before."

McCormick, Evidence (1954 ed.), § 158, p. 335; also Wigmore, Evidence (3d Ed.1940) § 1617. 29 Am.Jur.2d § 378: "In the case of a criminal defendant, reputation as to the party's character must relate to the time when the crime was committed or to the period prior to then." (footnotes omitted).

And Pennsylvania, where Petitioner's murder conviction was obtained, acknowledges both time categories as relevant. See Superior Court's ruling in this case, Commonwealth v. Showers: "It has long been held that evidence of reputation for truthfulness must relate to the time of trial." Appendix at A17-A18, citing Smith v. Hine, 179 Pa. 203, 36 A. 222 (1897), Miller v. Miller, 187 Pa. 572, 41 A. 277 (1898), and Commonwealth v. Hansell, 185 Pa.Super. 443, 137 A.2d 816 (1958). Other Pennsylvania courts, though, have stated that reputation evidence "must relate to a period at or about the time the offense was committed[.]" Commonwealth v. Luther, 317 Pa.Super. 41, 463 A.2d 1073, 1077-1078 (1983); Commonwealth v. White, 271 Pa. 584, 115 A. 870 (1922) (same).

Your Honorable Court is respectfully urged to examine these seemingly conflicting decisions about the time to which reputation must relate -- crime, trial or both -- in order to be relevant and admissible.

The next question is just how far removed in time may a negative character witness's knowledge of the accused's reputation be in order to be introduced against a defendant. Here, again, there has been a variety of decisions among the lower courts. In Pennsylvania the Supreme Court,

in civil cases, has said that reputation evidence related to a period four years before trial was too remote to be of any probative value, Miller v. Miller, supra, 41 A. at 283, as was a two-year period of time in Smith v. Hine, supra, 36 A. at 222. The Arizona Supreme Court excluded good character testimony on remoteness grounds in State v. Van Winkle, 478 P.2d 105 (Arizona 1970), where the proposed witnesses had known the accused two and three years before trial. And the Tennessee Supreme Court held that good character evidence dating back five years was too remote to be admissible. Strader v. State, 344 S.W.2d 546 (Tenn.1961), 87 A.L.R.2d 963. See, generally, "Admissibility of evidence of accused's good reputation as affected by remoteness of time to which it relates," 87 A.L.R.2d 968.

Legal commentators likewise have cautioned that remoteness may affect the admissibility of such evidence: "[e]vidence of the character or reputation of a party to a civil or criminal case should relate and be confined to a time not too remote from the time of the act in question." 29 Am.Jur.2d § 378. Also: "Reputation testimony should focus on the character and reputation of the witness for truthfulness at the time the witness testifies and not at some remote time." Pennsylvania Evidence, Packel and Poulin, § 608.1, p. 419; and McCormick, Evidence (3d Ed.1984) § 44 (same).

This Court has never, to the best of counsel's research, addressed the issue of remoteness and character evidence. In Michelson, however, it did permit defense

character witnesses to be cross examined about whether they had heard that the defendant had been arrested 27 years before trial, which is a somewhat different question than that at bar. For the reasons that follow, Petitioner respectfully asks that the Court accept this case for review and determine that the negative reputation evidence presented at her trial was far too remote to be admissible.

At trial, Mrs. Showers presented evidence as to her "excellent" reputation among persons in the community in which she resided for being a law-abiding citizen. These persons had known Petitioner for many years (15 or more), and continuously up to the time of trial. On rebuttal, the Commonwealth introduced three negative reputation witnesses, all from her former place of employment. Diane Campbell said her reputation for honesty was "not good," R. 245a-248a, Michelle Steinbacher testified "it wasn't good," R. 249a-250a, and Gloria Harbaugh stated that it "was bad, not good." R. 252a-254a. These inadmissible comments were severely damaging to Mrs. Showers before the collective mind of the jury, especially given the importance ascribed to evidence of good character which alone may warrant an acquittal.

The problem with this evidence is its extreme remoteness in time. These Commonwealth negative character witnesses testified based on knowledge of Mrs. Showers' allegedly poor reputation for honesty acquired nine or more years old before the time of trial. All of these witnesses knew Petitioner and others in the hospital in Lycoming County where Mrs.

Showers was employed as a practical nurse from 1979 until 1990, five years prior to trial. Campbell last knew her and her reputation in 1985; Steinbacher the same, 1985; and Harbaugh goes back even further, to 1983. Whatever knowledge they had of her reputation in the community for honesty was for too remote to have any bearing on this important matter for the jury's consideration.

The Superior Court, though accurately summarizing the state of the law in this area, proceeded to reach the wrong conclusion in this case. It noted that "[i]t has long been held that evidence of reputation for truthfulness must relate to the time of trial:

> When at the trial of a cause the character of a witness is shown in order to affect his credibility the question is whether he then told the truth. It is his character at the time he testifies that he is under investigation, and this is to be established by evidence of his general reputation at that time.
>
> . . .

Smith v. Hine, 179 Pa. 203, 206-07, 36 A. 222, 222 (1897); see also Miller v. Miller, 187 Pa. 572, 41 A. 277 (1898); Commonwealth v. Hansell, 185 Pa.Super. 443, 137 A.2d 816 (1958). The reason for this is that it would be unfair to judge a person, whether positively or negatively, on her remote reputation which may no longer be applicable or true." See Appendix at A17-A18.

Because the relevance of character

evidence is derived from present-day knowledge of an accused's reputation among persons in the community at the general time of the offense and trial, there is no probative value of a defendant's reputation a decade before trial. Two of these witnesses had no further contact with Petitioner after 1985 and they gave no indication that their knowledge was any more recent than 1985. The third knew Mrs. Showers only briefly in 1989 when, as she prejudicially testified, she fired her from the hospital's accounting department.

Here, the Superior Court majority has determined, contrary to well-established precedent in Pennsylvania and other jurisdictions, that negative character reputation evidence relating to a period of time nine to fifteen years before trial is not remote, has relevancy, and thus is properly admissible against the accused. Your Honorable Court is respectfully urged to review this decision and decide whether the remoteness of evidence as affecting its admissibility is to continue to have any meaning.

In addition, the Superior Court majority cited the Pennsylvania Supreme Court's ruling in Commonwealth v. White, supra, for the proposition that 20-year old evidence of a defendant's bad reputation was admissible when coupled with proof that the bad character continued at all times to the date of trial. See Appendix at A20. The White Court stated that standing alone, this evidence was too old to be relevant "had it not been given in connection with the testimony of other witnesses who were acquainted with defendant's reputation down

to the date of the trial." 115 A. at 871. The key is the phrase "down to the date of trial."

Ignoring this critical phrase articulated in White, the Superior Court majority here held that the Commonwealth properly demonstrated the ongoing reputation of Petitioner's dishonest notwithstanding the fact that its evidence of continuity stopped five years before trial. Without mentioning or explaining the five-year gap, it wrote:

> Similarly, the admission of character evidence in the instant case evidences Appellant's continuous reputation for dishonesty. Several witnesses testified that from approximately 1979 until 1989, Appellant had a reputation for dishonesty. Thus, the Commonwealth established an on-going, continuous reputation for dishonesty, corroborated by more than one person and spanning eleven years. This is not a case in which the only reputation evidence is one witness who testified that she knew the defendant for a short time many years ago.

See Appendix at A20-A21. The majority seriously misstated the evidence of record by attempting to place this evidence within the parameters set by the White Court.

First, unlike White, the proof of negative character reputation in this case did not "continue down to the date of trial"

but rather ended in 1989, a full five years prior to trial. Two of the three Commonwealth witnesses last knew of Mrs. Showers' reputation in the hospital in 1985, nine years before trial, and the third knew of that reputation only briefly in 1989. No witness testified that he or she knew of Petitioner's poor character reputation down to the date of trial or anywhere close. Is this, as Superior Court writes, "an ongoing, continuous reputation for honesty[,]" Appendix at A21, when there is a break of at least five years for one witness and nine years for the other two?

Second, these witnesses did not have a continuous eleven years' knowledge of Mrs. Showers' reputation from 1979 until 1989. Campbell knew the reputation from 1979 to the mid-1980's, Steinbacher between 1981 and 1985, and Harbough only in 1989. Op. at 8-9. There was a significant break in this knowledge of at least four years, between 1985 and 1989, and Harbough's knowledge was limited to less than a year. Certainly this is not the kind of continuous knowledge of reputation "down to the date of trial" envisioned by the Court in White.

Third, the Superior Court majority failed to recognize the evidentiary distinction between specific bad acts evidence and reputation evidence, which by definition is hearsay and based on rumor, gossip, talk, etc. When a witness testifies to certain bad acts which he or she has personally observed the accused commit, it stands to reason that the remoteness of time is less important given the inherent reliability of such testimony about conduct actually witnessed. By contrast, reputation

evidence is nothing more than "tolerated heresay" and, in a sense, is presumptively unreliable to the extent it is the only form of heresay admitted for the truth of the matter asserted and founded on the pure opinions of others.

For this very reason, evidence of character reputation -- negative or positive -- should be as close in time as possible to trial or to the conduct alleged in order to possess a higher degree of probative, reliable evidentiary value and thereby overcome the untrustworthiness attendant to hearsay testimony generally. The question of remoteness is critical to the admission of reputation evidence. It is less important to the admissibility of other types of evidence, such as prior bad acts, which are far more reliable and carry greater probative weight. Superior Court did not appreciate this distinction.

Finally, to further illustrate the prejudice sustained by Petitioner, the defense introduced evidence of her excellent reputation for law-abidingness in her community of residence, which is Northumberland County. These persons had known her for many years and continuously down to the time of trial. The Commonwealth, on the other hand, unable to produce anyone from the local community and/or who had known of Mrs. Showers' reputation continuously to the time of trial, had to obtain its negative character reputation witnesses from the hospital in which Petitioner worked in Lycoming County in the 1980's to say that she had a dishonest reputation. This further illustrates the prejudicial impact of the

admission of unduly remote character evidence.

Because this Court has not discussed at any length the standards for admitting character reputation evidence in a criminal trial since 1948 in Michelson, see, e.g., Spangler v. United States, 101 L.Ed.2d 918-919 (1988) (White, J. dissenting from denial of certiorari), it should grant Mrs. Showers' petition and address the merits of her claim.

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2. Petitioner was denied the effective assistance of counsel by the failure of her attorney to conduct any meaningful cross-examination of the Commonwealth's psychiatrist, who opined that Petitioner's husband was not a suicide risk, which testimony contradicted the defense theory that he had committed suicide and the defense forensic psychiatrist's opinion that he definitely was a high suicide risk.

The critical issue at trial was whether Mr. Showers committed suicide or whether his wife murdered him. The defense called Dr. Doyle, a board-certified forensic psychiatrist, who gave detailed testimony, reviewing Delbert's mental health records, history of chronic depression and anxiety, suicidal thoughts expressed to others, and physical condition and then offered the opinion that Mr. Showers was a high suicide risk. If believed by the jury, this expert opinion alone would have substantiated the finding that Petitioner did not murder her husband.

In rebuttal, the Commonwealth presented Dr. Hume, a non-board certified psychiatrist who went through Dr. Doyle's testimony point-by-point and gave the opposite opinion: that because Mr. Showers met only 5 of the 10 suicide factors, he was not a high suicide risk. With the exception of Mrs. Showers' own testimony, the testimony of the two psychiatrists arguably was the most important evidence received by the jury.

Defense counsel's cross-examination of the Commonwealth's most important witness, Dr. Hume, consisted of just a handful of questions as to how much he was being paid, when he was retained, and when he completed his report. See R. 242a-244a. This was the extent of defense counsel's so-called cross examination of the prosecution's most critical witness, the one who was allowed to offer an opinion coming close to the ultimate issue, and which contradicted Mrs. Showers own version of events: Mr. Showers was not a suicide risk.

Under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), this Court held that first, a defendant must demonstrate that his claim has arguable merit. If so, he must next show that his lawyer had no reasonable basis for the act or omission in question. And then, a defendant must establish that but for counsel's act or omission, the outcome of the proceedings would have been different.

What reasonable basis could defense counsel possibly have had for failing to cross examine the psychiatrist who

essentially said that Delbert Showers did not commit suicide, leaving the inference he was murdered? Not one meaningful question was asked of him apart from the first: "Doctor, can you rule out suicide?" The objection to this question was sustained and he was told to rephrase it. Rather than rephrase the form of the question and point-blank ask him whether, for example, a person with chronic depression and anxiety is a greater risk for suicide than a mentally healthy, well-adjusted person, counsel asked a few questions about how much he got paid, who paid him, when he was retained, why didn't he prepare a report -- all collateral questions and none of which went to the heart of the issue.

To provide Mrs. Showers with effective assistance of counsel, the defense attorney should have explored the basis for Dr. Hume's conclusion. "Doctor, isn't it true, as Dr. Doyle stated, that a person hospitalized with a nervous breakdown is 4 to 5 times more likely to commit suicide than one who is not?" "Assuming that Delbert Showers told intimates of his suicidal urges and thoughts, doesn't that make him a higher suicide risk relative to the rest of the general population?" "How about his medication, doctor?" "Do those on anti-depressant, anti-anxiety medications commit suicide more often than those not? And if not, why not?" "Does the simple fact that, as you have testified, he satisfied 5 out of the 10 suicide factors mean he has a greater tendency to commit suicide?"

Remarkable: a defense attorney who fails to cross examine the Commonwealth's expert psychiatric witness in a case where

the competing opinions on the suicide risk of the victim are critical to the jury's determination of whether Petitioner committed the murder or he took his own life. Can there ever be a reasonable basis for this omission?

The Superior Court majority frames this issue as whether "trial counsel was ineffective for not cross-examining Dr. John Hume more extensively." Appendix at A24; emphasis supplied. More extensively? That implies that Hume was cross-examined extensively. A series of about 12 questions, most perfunctory, does not an extensive cross examination make. Holding that trial counsel had some reasonable basis intended to effectuate Petitioner's interests, the panel said that:

> an extended cross-examination might have allowed Dr. Hume to restate his opinion regarding the deceased's risk of suicide. Thus, trial counsel's limited cross-examination of Dr. Hume has some reasonable basis to effectuate Appellant's interest.

See Appendix at A26. Granted challenging an expert's opinion necessarily carries the risk that he or she may reaffirm the original testimony. But there is no other way to subject to scrutiny an expert witness's conclusions than to cross examine extensively on each and every factor underlying that opinion.

Defense counsel was severely derelict in discharging the duty owed his client, Mrs. Showers. She has every reason to

expect that the right to counsel encompasses vigorous cross examination of all the Commonwealth's witnesses, but particularly the one expert whose opinion could (and probably did) make the prosecution's case. Because the failure to cross examine Dr. Hume could not and did not have any reasonable basis to advance Petitioner's interests, the Superior Court majority erred in ruling otherwise. Strickland v. Washington, supra. This Honorable Court is respectfully asked to review this claim of ineffectiveness of counsel and, upon review, grant her a new trial.

## Conclusion

WHEREFORE, Petitioner, Judy Ann Showers, respectfully requests that Your Honorable Court grant this petition, consider her appeal on the merits, and award her a new trial.

RESPECTFULLY SUBMITTED:

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